STATE OF MICHIGAN

COURT OF APPEALS

MELISSA BARGY, as Personal Representative of the Estate of WADE BARGY, Deceased, Plaintiff-Appellant,	UNPUBLISHED January 27, 2004
v	No. 241666 Antrim Circuit Court
GREAT LAKES PACKING COMPANY, Defendant-Appellee.	LC No. 00-007672-NO

Before: Zahra, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant's motions for directed verdict and JNOV in this contractor liability action. We affirm.

Plaintiff's decedent was an employee of a company defendant hired to complete construction on a building to house a holding tank used to brine cherries that was already built. While standing on metal scaffold planks that were suspended over the holding tank to permit workers to complete construction on the ceiling, plaintiff's decedent fell into the holding tank and suffered fatal injuries. Plaintiff filed this negligence action against the owner of the site asserting negligence theories of "retained control," inherently dangerous activity, and premises liability.

At the conclusion of plaintiff's presentation of proofs at trial, defendant moved for a directed verdict on plaintiff's premises liability claim which the trial court granted, holding that defendant could not be liable to an independent contractor's employee for injuries arising out of the manner in which the contracted work was performed. Defendant also moved for directed verdict on the retained control and inherently dangerous activity theories. The trial court partially granted a directed verdict on the retained control theory and that decision is not appealed. The trial court denied the motion with regard to the inherently dangerous activity theory. Thereafter, the jury found in plaintiff's favor on the inherently dangerous activity theory and, following the entry of judgment, defendant moved for JNOV. The trial court granted JNOV, holding that merely working at height alone did not meet the definition of "inherently dangerous activity" because it was a common risk of construction jobs and safety precautions necessary to alleviate the risk were also common. This appeal followed.

Plaintiff argues that her decedent was engaged in an inherently dangerous activity when he was injured, therefore, JNOV should not have been granted. We disagree. A trial court's decision on a motion for JNOV is reviewed de novo. *Sniecinski v BCBSM*, 469 Mich 124, 131; 666 NW2d 186 (2003). However, JNOV should be granted only when there was insufficient evidence, as a matter of law, presented to create an issue for the jury. *Craig v Oakwood Hosp*, 249 Mich App 534, 547; 643 NW2d 580 (2002).

The inherently dangerous activity doctrine is one exception to the well-established law that general contractors are not ordinarily liable for a subcontractor's negligence. *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 5; 574 NW2d 691 (1997). In a recent opinion, this Court reiterated the requirements of its application:

> Under the doctrine, liability may be imposed when "the work contracted for is likely to create a peculiar risk of physical harm or if the work involves a special danger inherent in or normal to the work that the employer reasonably should have known about at the inception of the contract." The risk or danger must be recognizable in advance, i.e., at the time the contract is made. The Court in *Bosak* [*v Hutchinson*, 422 Mich 712, 728; 375 NW2d 333 (1985)] emphasized that liability should not be imposed where a new risk is created in the performance of the work and the risk was not reasonably contemplated at the time of the contract.
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> Similarly, liability should not be imposed where the activity involved was not unusual, the risk was not unique, "reasonable safeguards against injury could readily have been provided by well-recognized safety measures," and the employer selected a responsible, experienced contractor. [*Schoenherr v Stuart Frankel Development Co*, ___ Mich App ___; ___ NW2d ___ (2003) (Docket No. 238966, issued 12/23/03), slip op at 2-3, quoting *Rasmussen v Louisville Ladder Co, Inc*, 211 Mich App 541, 548-549; 536 NW2d 221 (1995) (internal citations omitted).]

Here, plaintiff's decedent was working on construction of the ceiling while standing on metal scaffold planks suspended over the holding tank when he fell. We agree with the trial court that there was no genuine issue of material fact that any peculiar risk in performing plaintiff's work was not inherent in or normal to the work. Working at a height above ground level, even over a hole, does not create an unusual or unique risk that could not be mitigated through the proper use of well-recognized safety measures. See *Rasmussen*, *supra* at 549. Plaintiff's decedent's employer admitted that working over a hole was not uncommon or unique to his business, that his company worked over basements, setting trusses "all the time," and that safer measures could have been implemented on the day of the incident.

Contrary to plaintiff's argument, this case is distinguishable from *Oberle v Hawthorne Metal Products Co*, 192 Mich App 265; 480 NW2d 330 (1991). In that case, the plaintiff walked into an unguarded concrete pit in the floor. In this case, plaintiff fell into an aboveground holding tank while standing on planks suspended over it; had the proper safety measures been implemented, the fall would not likely have occurred. See *Bosak*, *supra* at 728-729. Accordingly, the trial court properly granted JNOV on this claim.

Next, plaintiff argues that the trial court improperly granted defendant's motion for directed verdict as to her premises liability claim because special aspects of the condition, as discussed in *Lugo v Ameritech Corp, Inc*, 464 Mich 512; 629 NW2d 384 (2001), made this open and obvious danger unreasonably dangerous. However, the trial court did not dismiss this claim on the ground that the danger was open and obvious; rather, the trial court dismissed the claim on the ground that "a landowner is not liable to an employee of an independent contractor when the employee's injuries arise out of the manner in which the employee chose to complete the assigned task" and further noted that plaintiff's decedent's injuries "arose from the manner in which he chose to perform the work, that is on an unguarded pick suspended over an open tank whose bottom lay 13 feet below." Since this issue whether the danger was open and obvious and had special aspects associated with it was neither raised nor decided by the trial court, and was not the ground on which this claim was dismissed, this Court may not consider this issue. See *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999); *Allen v Keating*, 205 Mich App 560, 564-565; 517 NW2d 830 (1994).

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper